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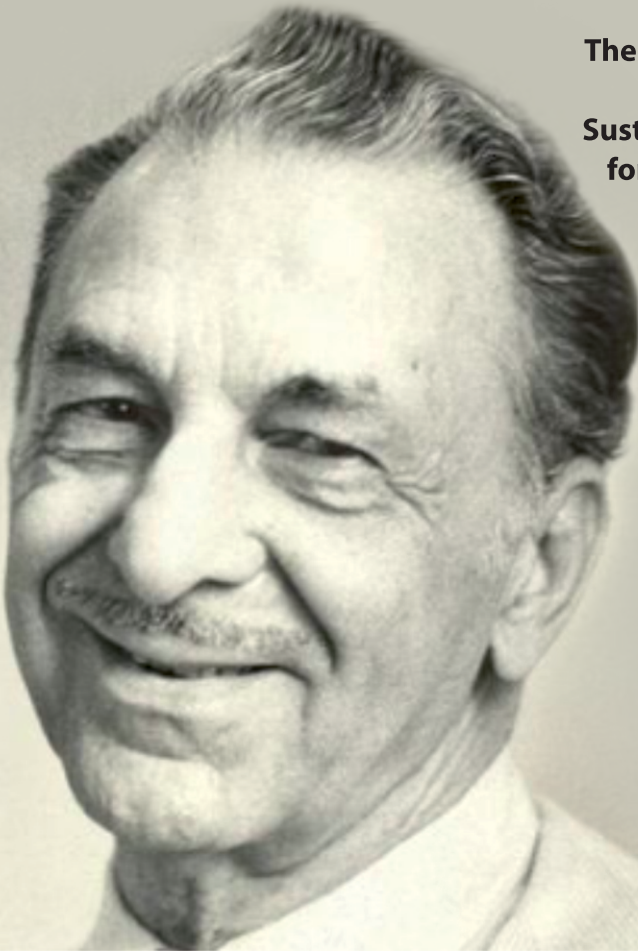
Xavier School of Management

For the greater good

# JRD TATA ORATION ON BUSINESS ETHICS

## Topic

**The Place of International  
Law in Seeking  
Sustainable Development  
for India: Some Ethical  
Reflections**



Fr (Dr.) Frank Brennan, SJ  
Professor of Law  
Australian Catholic University

**THE TWENTY-FIFTH ORATION**  
Saturday, November 26, 2016



## VISION

To be an institution of excellence nurturing responsible global leaders for the greater common good and a sustainable future

## MISSION

- + To disseminate knowledge in management through a portfolio of educational programs and publications
- + To extend frontiers of knowledge through relevant and contextual research
- + To nurture responsive ethical leaders sensitive to environment and society
- + To encourage critical thinking and continuous improvement
- + To inculcate a culture of innovation and entrepreneurship

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Inspired by the Jesuit spirit of "Magis", XLRI will be guided by the following values:

- + Ethical Conduct
- + Integrity and Trust
- + Passion for Excellence
- + Sensitive Social Conscience
- + Inclusiveness and Tolerance
- + Creativity and Innovation
- + Global Mindset



# **The 25<sup>th</sup> JRD Tata Oration on Business Ethics**

## **The Place of International Law in Seeking Sustainable Development for India: Some Ethical Reflections**

**By**

***Fr (Dr.) Frank Brennan, SJ***





***“I would like to be remembered as an honest man  
who tried to do what he thought was right”***  
***- JRD Tata***



## ORATORS

- |                                       |                   |
|---------------------------------------|-------------------|
| 01. Mr JRD Tata                       | March 4, 1991     |
| 02. Mr Joseph M Sciortino             | February 28, 1992 |
| 03. Justice BakhtavarLentin           | January 27, 1993  |
| 04. Dr Kenneth E Goodpastor           | February 11, 1994 |
| 05. Very Rev. Fr Peter-hansKolvenbach | October 18, 1995  |
| 06. MsTarjaniVakil                    | October 25, 1996  |
| 07. Mr Chris Frost                    | January 17, 1998  |
| 08. Mr Suresh Krishna                 | October 16, 1998  |
| 09. Dr Amrita Patel                   | October 10, 1999  |
| 10. Dr Robert Drinan                  | December 21, 2000 |
| 11. Dr Ramachandra Guha               | November 29, 2001 |
| 12. Sir Mark Tully                    | December 17, 2002 |
| 13. His Eminence Cardinal Toppo       | February 9, 2004  |
| 14. Dr James J Spillane               | November 29, 2004 |
| 15. Prof. Dr Peter Eigen              | November 26, 2005 |
| 16. MrSubrotoBagchi                   | December 1, 2006  |
| 17. Dr Steven Snyder                  | January 9, 2008   |
| 18. Dr Anil Kakodkar                  | November 30, 2008 |
| 19. MrTarun Das                       | November 20, 2010 |
| 20. MrLaxmanNarasimhan                | November 19, 2011 |
| 21. Mr Chris Lowney                   | November 24, 2012 |
| 22. DrPallam Raju Mallipudi           | December 7, 2013  |
| 23. Mr D Shivakumar                   | November 29, 2014 |
| 24. Mr. Shekhar Gupta                 | November 24, 2015 |

*The Place of International Law in Seeking Sustainable Development for India: Some Ethical Reflections*

Speech delivered by Fr (Dr.) Frank Brennan, SJ  
on November 26, 2016 at XLRI, Jamshedpur

It is a profound and humbling honour for me to be invited to come to India for the first time in my life and to deliver the 25<sup>th</sup> JRD Tata Oration. Unfortunately, a family death precluded my coming to India for even an initial fortnight in order to experience some of the wonders of your great country. I am a Jesuit, a Catholic priest, an Australian of Irish heritage, and a lawyer. So I know next to nothing about business. I am a one-week novice in India. I come from a religious tradition which has only a minority of adherents in this vast land. I come from a country which like yours started the modern era under the colonial yoke of the British Empire. Unlike you, we gave no recognition whatever to the sovereignty or the land rights of the indigenous peoples. In our case, Aboriginal Australians had been the owners and occupiers of the land for up to 60,000 years. Eventually six British colonies were federated to form the Commonwealth of Australia – an island nation continent. Nowadays 28 percent of Australians are born overseas. With 433,000 Indians now living in Australia, the number of Australian residents born in India has almost tripled over the last 10 years. 46 percent of Australians have at least one parent born overseas. And yet, or perhaps because of this, my nation has earned a particularly harsh international reputation, of late, for designing laws and policies aimed at ensuring that asylum seekers in our globalised world, that includes 60 million displaced people, do not reach our shores. Our Prime Minister recently boasted that our system for securing national borders was the best in the world. Suffice to say it can be emulated only by those nation states which are island nation continents and which have mendicant island neighbours prepared to warehouse and process unvisaed asylum seekers, and which are sufficiently far from the world's major trouble spots that the asylum seekers are not in direct flight from persecution in the region, but rather are engaged in protracted journeys to seek more adequate protection, more transparent processing, and a more benign migration outcome.

It is a tribute to the universal appeal of JRD Tata and to the imaginative creativity of this Oration's organisers that one of such a different religious, professional and national background might be thought to have something to contribute to your national quandaries about business and

ethics in India at this time. I take heart that on receipt of the Bharat Ratna in 1992, JRD said “I do not want India to be an economic superpower. I want India to be a happy country.” I daresay that JRD with his background and commitment to the establishment of the airline which was a precursor to Air India would be well pleased that the speaker for today's silver jubilee oration flew on the Air India Boeing 787 Dreamliner direct from Melbourne to Delhi in 15 hours, and I was happy with the experience.

My thesis this evening is that no matter what the economic, political and legal problems are confronted by modern day India, these problems can be better addressed and answered by a consideration of the profound truths and insights of all the religious traditions represented in this country. An application of the key principles and norms developed in the international law of trade and human rights, helping to enunciate the realm of law, regulation and political accountability, enhancing public scrutiny, providing the right environment for doing business, and that no matter how well developed the regulatory machinery, no matter how elaborate the constitutional separation of powers and the legislative provisions for accountability, there will always be a place for and a value-add from the national culture, corporate ethos and personal character. Thus there is a need to ensure that the national and ethnic cultures are sufficiently open to international influences and sufficiently grounded in the goodness and the daily concerns of the ordinary citizen. **There is a need to create the right corporate ethos and an appropriate business environment, particularly in a country which is still ranked 138<sup>th</sup> in the global ratings for ease of business investment.** And, as JRD Tata demonstrated by his own life, what a bonus it is for the country when even the most endowed and most privileged business leader is a person of sound character with a conscience dedicated to the common good and the national interest as well as to corporate profit and personal well-being.

To offer a very Anglo-Western perspective, might I suggest that there are learnings for all of us from Brexit and now the election of Donald Trump. **In these robust Western democracies with a strong commitment to the rule of law, there is a growing sense that the divide between rich and poor is becoming unbridgeable and that the gap between the technologically savvy and the not so savvy is contributing to a sense of powerlessness, alienation and anomie such that an increasing number of citizens are convinced that the political, legal and economic system is fixed against them, with the result that they have**

**lost all sense of agency and hope of full human flourishing.** They have lost jobs in the wake of globalisation and tariff reductions and they have abandoned all hope that they will enjoy the same job security and comfort as their parents. They sense that the major political parties and social institutions have conspired against them, failing to repel the forces of globalisation which are corroding the old safeguards for employment, security, and national identity. One certainty is that neither Brexit nor a Trump presidency is going to solve the most acute problems of those who voted for them. In the USA, those lacking the education and opportunity to participate in the new economy will gain little from Mr Trump's commitment to build a wall, to keep out Muslims and to re-ignite the fossil fuel economy. Even Mr Trump will eventually have to contribute to stemming the displacement of 60 million people on our planet and to reversing the drastic effects of climate change.

Many of the issues you confront in India are very different from those faced in societies like the USA and the United Kingdom. But what's common is a sense of the citizenry that there are global forces at play and global allegiances and agreements which can both undermine national integrity and identity, as well as contribute to national well-being and development, depending on how adept we are at riding the wave of internationalism while maintaining our national sovereignty. Ironically there is a growing understanding that some problems cannot be confronted adequately except with international co-operation and some national controversies can be more readily resolved by reference to international norms and processes with which the nation state agrees to comply as an exercise of national sovereignty.

Being a Catholic priest with a vow of poverty, living in an advanced country where most of my needs are provided by the state including adequate health care, good standard education, and security, it is not for me to lecture business folk prescriptively in the developing economy of India how to provide adequately for the world's poor. The most I can do is appeal to your finer nature and point to your great precursors like JRD Tata. An outsider, I recall that **JRD Tata once wrote in reply to a letter by Prof Sahni, IIM Bangalore, who requested him to share his philosophy of life with his students:**

*If I were to attribute any single reason to such success as I have achieved, I would say that success would not have been possible without a sustained belief that what I did or*



*attempted to do would serve the needs and interests of our country and our people and that I was a trustee of such interests.*

The World Bank acknowledges: India's economic and human development is one of the most significant global achievements of recent times. Your share of global GDP escalated from 1.8 to 2.7 percent between 2005 and 2010. More than 53 million people have been lifted out of poverty here in India in that time – and that's more than twice the entire population of Australia. Between 2003 and 2013, your economy expanded at an average rate of 7.6 percent, making you one of the 10 fastest growing nations. The World Bank notes: Exports account for 21.5 percent of GDP, three times more than in 1990, and net inflows of foreign direct investment (FDI) make up another 1.6 percent. Life expectancy has more than doubled between 1947 and 2011 from 31 years to 65 years. Adult literacy had more than quadrupled between 1951 and 2011 from 18 percent to 74 percent. These are great achievements, and yet you are still home to one third of the global poor—400 million people. More disturbing: With population growth, the absolute number of poor people actually increased in some of your poorest states between 2004–05 and 2009–10, with poverty rates three to four times higher than those of the most advanced states—Haryana, Kerala, and Punjab. When it comes to the great ethical challenge of striking an appropriate balance between poverty alleviation and climate change, you have some of the most difficult decisions to make when determining how much cheap electricity might be produced to lift people from poverty while making the planet less liveable for their descendants. The World Bank notes:

*An estimated 300 million people do not have access to electricity, while those who are connected to the grid must cope with unreliable supply. Sixty percent of firms resort to costly backup power generation. The sector continues to be hobbled by a range of problems—among them energy demand that far outstrips supply, below market pricing of electricity, constraints in coal and gas supply that force generation stations to operate below capacity, and high rates of loss (technical, commercial, and financial) in distribution. The continued unreliability and poor quality of electricity supplied to firms and households sap investment and growth and reduce India's competitiveness.*

Your quest for cheap coal to generate electricity is subjected to understandable scrutiny in Australia with the proposed development of Adani's Carmichael Coal Mine. Some think that environmental lawyers and environmentalists take a too restricted view of the complexity of the competing goods to be achieved. One of our leading Australian judges, and a great internationalist, Michael Kirby when paying tribute to graduates of a business school at a university graduation observed:

*You have more to teach judges and lawyers than we generally care to acknowledge. At least in business schools there is a self-conscious search for all the factors that influence important decision-making. There is a constant study of whether business decisions are effective or not. Commonly, in business, the market constitutes the final court of appeal. It tolerates little dissent. In the law, our decision-making tends to be more formal and less empirical. Correctives are often a long time coming.*

Serving the needs and interests of our planet, in fact, just saving our planet, is the great contemporary challenge, while at the same time continuing to raise India's poor out of poverty. **Those who are privileged with wealth, power and honours need to see themselves as the primary custodians of the planet and as key contributors to the relief of dehumanising poverty.** I note that your Prime Minister Mr Modi has twice addressed the General Assembly of the United Nations. In 2014 shortly after he became Prime Minister, he told the Assembly:

*India is a country that constitutes one-sixth of humanity; a nation experiencing economic and social transformation on a scale rarely seen in history. Every nation's world view is shaped by its civilization and philosophical tradition. India's ancient wisdom sees the world as one family. It is this timeless current of thought that gives India an unwavering belief in multilateralism.*

I don't know what success Mr Modi has had in calling for a World Yoga Day. I think the idea is still to take hold down under in Australia. But he has noted the need for the world to operate on three levels: the need for a change of personal lifestyles, national action, and what he calls 'a beautiful balance of collective action – common but differentiated responsibilities'. Returning to the UN in 2016, he invited members to focus on the global public good and not just private returns. He said:

*The principle of common but differentiated responsibilities is the bedrock of our collective enterprise. When we speak only of climate change, there is a perception of our desire to secure the comforts of our lifestyle. When we speak of climate justice, we demonstrate our sensitivity and resolve to secure the future of the poor from the perils of natural disasters.*

**Often we wonder what is the point of global conversations, such as these talk fests by the world leaders at the UN that result in no immediate outcomes. The fruits include:** the ongoing **consolation** that we can share our deepest insights with competent, accomplished individuals knowing that our uncertainties and limitations are not held against us, but are reckoned as part of the global calculus in discerning how we might start addressing big unresolved questions about sustainable and equitable economic well-being for all; the **enthusiasm and optimism** born of the realization that a meeting of minds can effect real change globally and with immediate consequences; the **hope** that in the face of enormous difficulties and problems we can translate the oft-repeated declaration 'They should do something about it', into the insight, 'We are they'; the **satisfaction** of knowing that together we can provide respectful space to drill down together doing the deeper thinking and the more critical self-reflection needed for us to return to our cabinet tables, our board rooms and workplaces more grounded in the challenges and the means for meeting them; and the **stimulation** of realising that there are still fundamental disagreements about the most basic issues underpinning sustainable, equitable economic well-being for all, including the requirement for continued economic growth and the necessity of reducing greenhouse gas emissions and other human contributions to the warming of the planet.

**There is no international legal regime in place for the guaranteed protection of human rights and for the protection of the planet. But there is now a plethora of international human rights instruments to which nations are voluntarily a party. These instruments though not enforceable directly in domestic or international courts are suasive.** Increasingly there are optional protocol procedures being appended to key international human rights instruments allowing disaffected individuals to agitate their human rights complaints against their national government before an international disputes body. The procedures are usually

perfunctory with matters being decided on the papers, but the media attention to some of these complaints assists focus the attention of governments on the complaints and there is a developing jurisprudence developing. Also there is periodic reporting which is required of signatories to key international human rights instruments. And now there are the Universal Periodic Reviews (UPR) conducted under the auspices of the United Nations Human Rights Council (UNHRC). Member states provide a peer review of each other with each state coming under the spotlight once every four years. Despite the political correctness and the political point scoring in these exercises, over time they contribute to a culture of human rights.

Marking the 60<sup>th</sup> anniversary of the UN Declaration of Human Rights, the late and revered Irish poet Seamus Heaney wrote :

*Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system. The articulation of its tenets has made them into world currency of a negotiable sort. **Even if its Articles are ignored or flouted—in many cases by governments who have signed up to them—it provides a worldwide amplification system for the still, small voice.***

There is of course no international legal regime for the comprehensive governance and regulation of commercial activity. But increasingly nation states are negotiating free trade agreements and other trade treaties. In addition to membership of the World Trade Organisation, they are also committing themselves to a plethora of international dispute resolution procedures including conciliation and arbitration under the auspices of the Permanent Court of Arbitration.

Australia's last Solicitor General Justin Gleeson SC who had a range of experiences before these international fora recently postulated some interesting questions:

*Every time we exercise sovereignty by assuming an international obligation, we have two further choices.*

*One is to bind ourselves further to the international project by submitting to a binding dispute resolution mechanism, of the type which best suits the case. The other is to eschew the prospect of being able to be held to account for whether we have breached our international obligations. Do we turn the first way for trade obligations, in order to close the deal, but the second way for human rights obligations? Is that a principled way to proceed? What kind of future do we want for our country in our engagement with the international legal order?*

The Australian Parliament responding to the irrefutable health risk of smoking has instituted a ban on cigarette advertising and legislated for plain packaging of cigarettes. In Australia, you can still buy cigarettes. But they have to be held in locked cupboards by merchants. The packaging is plain with only graphic health warnings about the ghastly effects of smoking, including photos of collapsing lungs and gangrenous limbs. The Marlboro man on horseback is an historic relic in Australia. The Australian Institute of Health and Welfare reports: 'Daily smoking rates in Australia are among the lowest in the world. In 2013, 13 percent of the population aged 15 and over in Australia smoked, compared to 20 percent in the United Kingdom, 15 percent in Canada and 14 percent in the United States. Australia's rate was well below the average across 34 OECD countries (Organisation for Economic Cooperation and Development) (20 percent)' There have been many contributing factors to the marked decrease of smoking in Australia, including steep and rising excises, prohibitions on smoking in public places, and the plain packaging law. India's Ministry of Health and Family Welfare produced a fact sheet on the Global Adult Tobacco Survey for 2009-10 which found that 34.6 percent of adults use tobacco in some form — 47.9 percent of males and 20.3 percent of females. At least 14 percent of Indian adults smoke.

**It's still early days but the plain packaging legislation is thought to be having a marked effect on the smoking habits of young Australians and contributing to a marked decline in sales, dissuading young people even to give it a try. The tobacco manufacturers obviously think there is a real risk to their global sales if this sort of legislation is enacted in other countries. They are displeased.** They first claimed that the legislation effected an acquisition of their property on other than just terms contrary to the Australian Constitution. When they failed in the

Australian courts, they went on to claim before an international arbitration that these measures were an interference with free trade, contrary to various provisions of free trade agreements which Australia has voluntarily negotiated with other countries.

One tobacco producer Philip Morris tried to invoke some provisions of Australia's bilateral investment treaty (BIT) with Hong Kong to challenge the Australian restrictions on free trade and advertising of cigarettes. Australia has 21 such bilateral treaties including the one finalised with India in 2000. All up, there are now over 3000 BITs which have been negotiated globally.

Philip Morris Asia Ltd, a company incorporated in Hong Kong, acquired a 100 percent shareholding in Philip Morris Australia Ltd thereby obtaining an indirect interest in its subsidiary Philip Morris Ltd. This way the PM group thought they would be able to invoke the provisions of the BIT between Hong Kong and Australia. Ultimately they failed with the tribunal finding that the corporate restructure was engaged in specifically so as to invoke the provisions of the BIT and that this was an abuse of process.

The seat of the PM arbitration was Singapore with the consequence that the Singapore domestic courts could have been required to determine disputed questions according to Singapore domestic law including questions which had been resolved finally by the Australian High Court which were questions about the interpretation of the Australian Constitution.

Australia's Chief Justice Robert French has sounded salutary warning notes about the capacity of private parties involved in investor-state dispute settlements (ISDSs) to bring claims against countries which are parties to BITs or free trade agreements (FTAs). With a second bite of the cherry, even if they have failed in a challenge to the constitutional validity of impugned legislation in a nation's highest court, investors might try to claim in an international arbitration that the decision of the respondent state is a breach of a provision of the investment treaty to which the State is a party.

The Australian High Court had delivered a judgment in which it rejected challenges to the validity of the *Tobacco Plain Packaging Act 2011 (Cth)*. The tobacco companies had argued that the Act effected an acquisition of



their intellectual property rights in trademarks, designs, copyright and get-up used on cigarettes and cigarette packaging. They argued that the acquisition, being uncompensated, was not on just terms. The Australian Court rejected their submission that the legislation amounted to an acquisition of property on other than just terms contrary to section 51 (xxxii) of the Australian Constitution. One of the majority judges observed: 'The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property.'

But for the abuse of process, it was possible that the Singapore tribunal, in the context of an argument about expropriation, could have been asked to form a view about the correctness of the Australian High Court's conclusion that there was no acquisition within the meaning of section 51(xxxii) of the Australian Constitution. In an extraordinary development, an Australian retired High Court judge was on hand in Singapore to provide advice to, and evidence for, the tobacco companies questioning the correctness of the High Court decision which of course was delivered after he had left the bench.

This case highlights the extent to which it may be possible in future for businesses to utilise free trade agreements in order to impugn even the final binding decisions of national constitutional courts of final appeal. Though in the end such procedures can be accommodated with notions of national sovereignty, there are many citizens and, dare I say it in the Brexit-Trump era, many politicians who regard such moves as inconsistent with national sovereignty.

**If businesses pursuing their economic self-interest are able to utilise such international legal procedures, then what about marginalised and vulnerable citizens who feel that their basic human rights are being overlooked not just by governments and parliaments but also by the courts, including national final courts of appeal?**

The American international lawyer Mary Ellen O'Connell concludes her book *The Power and Purpose of International Law* with the observation:

*International law needs improvement, not demolition, because it remains the single, generally accepted means to solve the world's problems. These problems will not be solved by armed conflict or the imposition of a single ideology or religion. Through international law diverse*



*cultures can reach consensus about the moral norms that we should commonly live by. People everywhere believe in law, believe in this alternative to force, as they believe in higher things. They want the power of law to be used to achieve the community's most important common goals. International law reflects that the international community's shared goals are peace, respect for human rights, prosperity, and the protection of the natural environment.*

**International law, statesmanship, moral leadership by civil society, including religious communities and religious leaders of various faith traditions can all contribute to a developing consensus about the moral norms that we should commonly live by,** providing a leg up for those who are still living in poverty and securing our national borders while being responsive to our obligations to those less fortunate than ourselves because they find themselves on the wrong side of our borders plagued by persecution.

When considering the mission of international lawyers trying to humanise domestic laws and policies, especially those laws and policies which pay insufficient regard to the rights and liberties of the excluded whether within or outside national borders or which patently disregard the need to sustain the planet for future generations, I call to mind Martii Koskenniemi's prescient remarks:

*International law increasingly appears as that which resists being reduced to a technique of governance. When international lawyers are interviewed on the Iraqi war, or on torture, or on trade and environment, on poverty and disease in Africa — as they increasingly are — they are not expected to engage in hair-splitting technical analyses. Instead, they are called upon to soothe anxious souls, to give voice to frustration and outrage. **Moral pathos and religion frequently fail as vocabularies of engagement, providers of 'empty signifiers' for expressing commitment and solidarity. Foreign policy may connote party rule. This is why international law may often appear as the only available surface over which managerial governance may be challenged, the sole vocabulary with a horizon of transcendence - even***

*if, or perhaps precisely because, that horizon is not easily translated into another institutional project. I often think of international law as a kind of secular faith.*

None of us would want more realistic and more decent options in these most toxic of times to be forfeited simply because there is a new emerging fundamentalism being preached by the most respected high priests of international law. For example, in Australia, our debates about border protection and asylum often divide between those who claim that law and policy complies with the letter of the key international instruments and those who claim it violates the spirit of those instruments. None of us has a right to enter another country and all of us have the obligation not to return anyone presenting at our border to a situation of persecution, torture, or cruel punishment. Though I doubt the possibility of the European Union (EU) negotiating appropriate returns of asylum seekers to Libya in the foreseeable future, **I continue to entertain the hope that Australia can negotiate appropriate returns to transit countries such as Indonesia for Iraqis, Afghans and Iranians and India for Tamils, so that Australia might then decently extend the hand of welcome to more of the world's 60 million displaced persons who might be issued with humanitarian visas for permanent settlement in Australia without the need for their risking perilous unvisaed voyages. For the moment, my country is failing to strike the right balance between human rights and the national interest. It is stopping the boats indecently, violating the human dignity of those being held in unsatisfactory conditions in Papua New Guinea and on Nauru and failing to ensure appropriate safeguards are in place for the return of asylum seekers to Indonesia.** For as long as international lawyers claim there is no possibility of a legally negotiated regional agreement for safe returns because they argue that asylum seekers have a right of entry to Australia to seek asylum, the Australian government, the Australian parliament, and the Australian courts will maintain, with impunity but with the occasional expression of outrage from international lawyers, a regime of returns insufficiently scrutinised for human rights compliance. The boats will continue to be stopped (no matter which political party is in power), but they should be stopped decently and in compliance with the legal regime enunciated by the EU which has to deal with a far more pressing issue but subject to the more searching supervision of the European Court of Human Rights and of the European Parliament which has greater sensitivity to the human

rights of asylum seekers than do their more pragmatic Australian colleagues.

**Pope Francis's encyclical *Laudato Si'* is on the topic 'care for our common home'**. Rupert Murdoch's international press network was quick to label it a 'Papal prescription for a flawed economic order' with their national newspaper in Australia declaring, 'The church should not belong to the green-left fringe'.

Pope Francis is not the first pope to address a social encyclical to everyone. Pope John Paul II addressed his 1988 encyclical *Sollicitudo Rei Socialis* to members of the Church and to 'all people of good will'. Pope Benedict XVI did the same with his 2009 encyclical *Caritas in Veritate*. In comparison with his predecessors however, Francis has been more inclusive in the process of writing the encyclical and in the final content of the document. He quotes from 17 different conferences of Catholic bishops. This was rarely done by his predecessors. He is at pains to indicate that he is collaborative and that he takes the principle of subsidiarity very seriously. He convened meetings of various types of experts including scientists, economists and political scientists. He is not afraid to indicate that the final product is something of a committee job, with various authors.

Being the final redactor of the text, Pope Francis has felt free to interpolate some very folksy advice from time to time – from the need to use less air conditioning, to the appropriateness of consumer boycotts on certain products, to the desirability of saying grace before and after meals. **He has also taken the liberty of inserting some very blunt, evocative images of environmental and economic devastation: “The earth, our home, is beginning to look more and more like an immense pile of filth. In many parts of the planet, the elderly lament that once beautiful landscapes are now covered with rubbish.”**

His concerns are not narrowly dogmatic or pedagogical but universally pastoral. He knows that millions of people, including erstwhile Catholics, are now suspicious of or not helped by notions of tradition, authority, ritual and community when it comes to their own spiritual growth which is now more individual and eclectic. He wants to step beyond the Church's perceived lack of authenticity and its moral focus on individual matters or on content of faith, rather than depth of faith. **He thinks the world is in a mess particularly with the state of the planet – climate change, loss of**

biodiversity and water shortages, and with the oppression of the poor whose life basics are not assured by the operation of the free market, and with the clutter and violence of lives which are cheated the opportunity for interior peace. At the conclusion of the encyclical he describes the document as a 'lengthy reflection which has been both joyful and troubling'. Clearly he wants all people of good will to emulate him and to be both joyful and troubled as they wrestle with the problems of the age.

Pope Francis thinks the planet risks going to hell in a basket. He says he is 'pointing to the cracks in the planet'. Perhaps we should take heart from the recently deceased Leonard Cohen's observation, '**There is a crack in everything. That's how the light gets in**'. This is the only home we have got. And the science is in. It indicates that climate change is real. The loss of biodiversity is real. Human activity continues to contribute adversely to both changes, though of course there are other causes. We cannot undo the other causes. We do have the power to change and to address some of the human causes. An untrammelled free market will not provide the solution, neither will untrammelled governments whether they be self-seeking and corrupt or populist and short sighted. **Pope Francis sees an urgent need for people to be well educated, to be concerned about future generations, and to be focused beyond their national borders. He sees an urgent need for governments to abide by the rule of law. He sees an urgent need for markets to be regulated so that self-interest and economic imperatives can be better aligned to pay dividends for the planet and for future generations. He doesn't see how this can be done unless more people, especially those designing laws and regulations for government and economic actors, are integrated in themselves finding completion in a deep interior life marked by concern for neighbour and for creation as well as self.** Francis calls us to consider the tragic effects of environmental degradation especially on the lives of the world's poorest. He says:

*The problem is that we still lack the culture needed to confront this crisis. We lack leadership capable of striking out on new paths and meeting the needs of the present with concern for all and without prejudice towards coming generations. The establishment of a legal framework which can set clear boundaries and ensure the protection of ecosystems has become indispensable, otherwise the*

*new power structures based on the techno-economic paradigm may overwhelm not only our politics but also freedom and justice.*

**Developing the culture, the leadership, and the legal framework — These are the challenges to those of us who want to be intelligent contributors to truly sustainable development of India and the planet.** Having noted, 'There are certain environmental issues where it is not easy to achieve a broad consensus', he concedes that 'the Church does not presume to settle scientific questions or to replace politics. But I want to encourage an honest and open debate, so that particular interests or ideologies will not prejudice the common good'.

Hailing from Argentina, he puts his trust neither in ideological Communism nor in unbridled capitalism. Like his predecessors Benedict and John Paul II he is unapologetic asserting, 'By itself the market cannot guarantee integral human development and social inclusion.' His concern is not to settle arguments about politics, economics or science. He makes no pretence to give the last word on anything. He is wanting to enliven the passion and the spiritual commitment of his readers who grasping the link between care for the earth, care for the poor, and care for the personal interior life, will be motivated to work for real change.

Francis calls everyone to engagement in an honest and open debate, respecting the competencies of all, and inspired by the vision of St Francis of Assisi who is the model of the inseparable bond 'between concern for nature, justice for the poor, commitment to society, and interior peace'.

**Like many, Francis is convinced that we need to phase out our reliance on fossil fuels - coal, oil, 'and to a lesser degree, gas' - progressively and without delay.** I doubt that he would be a supporter of Adani Mining's proposed Carmichael mine in Australia which will be Australia's largest coal mine. He thinks any scheme for buying and selling carbon credits is deeply flawed. He is a great advocate for solar energy. But what is new is the integration of the scientific, the political, the sociological, the spiritual and the theological – an integration given the stamp of approval of the leader of one of the world's most significant religious communities. Granted that the Judeo-Christian tradition has done much to inculcate the notion that we humans are to subdue the earth, it is heartening that a pope has been able to say:

*The best way to restore men and women to their rightful place, putting an end to their claim to absolute dominion over the earth, is to speak once more of the figure of a Father who creates and who alone owns the world. Otherwise, human beings will always try to impose their own laws and interests on reality.*

It could be even more helpful for us to move beyond the patriarchal view of God. It is not only the Church that has been complicit, but it has been complicit especially in ventures of colonisation aimed at plundering the resources of indigenous peoples. Francis notes, 'Modernity has been marked by an excessive anthropocentrism.'

Where I find Francis truly prophetic, and this is where he grates the Murdoch press and the conservative Catholic think tanks in the west, is in his bold declaration:

*If we acknowledge the value and the fragility of nature and, at the same time, our God-given abilities, we can finally leave behind the modern myth of unlimited material progress. A fragile world, entrusted by God to human care, challenges us to devise intelligent ways of directing, developing and limiting our power.*

This provides the real challenge for those of you in India committed to sustainable development accelerating the alleviation of poverty for tens of millions of people who have never known the basics of good health, education and housing. Of course, the real heresy of this pope in the eyes of the free marketers who long presumed that the anti-Communist Polish Pope John Paul II was their unswerving ally is that he speaks of the need first to 'reject a magical conception of the market' and then to redefine 'our notion of progress'. He proceeds to utter the unthinkable, that 'the time has come to accept decreased growth in some parts of the world, in order to provide resources for other places to experience healthy growth'. This papal prescription is very difficult to reconcile with Christine Lagarde's often repeated IMF claim that what the world, and most especially the poor need, is strong economic growth across the board internationally. For example, Lagarde when speaking on 'Decisive Action to Secure Durable Growth' in April 2016 claimed: 'From a macroeconomic perspective, the first priority must be to secure the recovery and lay the foundation for stronger and more equitable medium-term growth.'



Overcoming the voices of despair and exclusion requires an alternative path - one that leads to prospects for more employment, higher incomes, and more secure lives.'

**There are still fundamental disagreements about the most basic issues underpinning sustainable, equitable economic well-being for all, including the requirement for continued economic growth and the necessity of reducing greenhouse gas emissions and other human contributions to the warming of the planet.** Pope Francis could well have had in mind some of our Australian Cabinet ministers, and dare I say some of your ministers in the Modi cabinet, when he wrote:

*A politics concerned with immediate results, supported by consumerist sectors of the population, is driven to produce short-term growth. In response to electoral interests, governments are reluctant to upset the public with measures which could affect the level of consumption or create risks for foreign investment. The myopia of power politics delays the inclusion of a far-sighted environmental agenda within the overall agenda of governments. Thus we forget that 'time is greater than space', that we are always more effective when we generate processes rather than holding on to positions of power. True statecraft is manifest when, in difficult times, we uphold high principles and think of the long-term common good. Political powers do not find it easy to assume this duty in the work of nation-building.*

In October 2015, the *New York Times* columnist Andrew Revkin spoke in Australia at a Global Integrity Summit. Revkin has been writing about science and the environment for more than three decades. Through his hard-hitting coverage of global warming he has earned most of the major awards for science journalism. He is no papal groupie but he reported on being one of the experts called to Rome for consultations when the encyclical was being drafted. In his Australian presentation, Revkin particularly emphasized this paragraph from the encyclical:

*We need to acknowledge that different approaches and lines of thought have emerged regarding this situation and its possible solutions. At one extreme, we find those who doggedly uphold the myth of progress and tell us that*



*ecological problems will solve themselves simply with the application of new technology and without any need for ethical considerations or deep change. At the other extreme are those who view men and women and all their interventions as no more than a threat, jeopardizing the global ecosystem, and consequently the presence of human beings on the planet should be reduced and all forms of intervention prohibited. Viable future scenarios will have to be generated between these extremes, since there is no one path to a solution. This makes a variety of proposals possible, all capable of entering into dialogue with a view to developing comprehensive solutions.*

Revkin was impressed at Francis's willingness to listen attentively to all views and to weigh the evidence. But we are left wondering whether Francis does take sides or not on the desirability of arresting economic growth at least in some countries and of taking drastic action to reduce human impacts on the climate.

In his folksy style, Francis notes that 'sobriety and humility were not favourably regarded in the last century'. He calls us back to a 'serene attentiveness', reminding us in a grandfatherly way 'that being good and decent are worth it'. He calls us to an 'ecological conversion'.

The encyclical would be all the stronger if it conceded that the growth in the world's human population - from 2 billion when Pius XII first spoke of contraception to 3.5 billion when Paul VI promulgated *Humanae Vitae* to 7.4 billion and climbing as it is today - points to a need to reconsider the Church's teaching on contraception. The pope is quite right to insist that the reduction of population growth is not the only solution to the environmental crisis. But it is part of the solution. It may even be an essential part of the solution. Banning contraception in a world of 7.4 billion people confronting the challenges of climate change and loss of biodiversity is a very different proposition from banning it in a world of only 2 billion people oblivious of such challenges. I don't think you would find any papal advisers today who would advocate that the planet's situation with climate change, loss of biodiversity, and water shortages would be improved if only all people of good will had declined to use artificial birth control for the last 50 years. **I note that JRD Tata had a**

**lifelong concern about population growth. He used to speak of the 'desperate race between population and production'.** He strongly disagreed with Nehru, who thought 'population is our strength'. JRD was committed to propagating methods to control India's population growth. He helped start what eventually became the International Institute of Population Studies. In 1992, JRD received the United Nations Population Award in recognition of his commitment to this task.

Joy filled and troubled, Pope Francis is inviting us to do something to change the market settings and political settings to modify the behaviour of all global citizens in the future, and he invites us to attend to our own Franciscan interior ecological conversion with our care for the vulnerable and 'an integral ecology lived out joyfully and authentically'. **Caring for our common home begins at home. But that's only the beginning, and it will get us nowhere unless there be agreement and committed action posited on economic growth tailored to the well-being of the poorest and economic activity within markets and state regulation designed to reduce the human impact on global warming.**

**Religious leaders have a capacity to contribute to that amplification of the still, small voice, as of course do international lawyers and business leaders. So too do poets, folk singers, and novelists. The concept of human rights has real work to do whenever those with power justify their solutions to social ills or political conflicts only on the basis of majority support or by claiming the solutions will lead to an improved situation for the mainstream majority. Even if a particular solution is popular or maximises gains for the greatest number of people, it might still be wrong and objectionable. There is a need to have regard to the well being of all members of the human community, and not just those within the preferred purview of government consideration.**

This month the 22<sup>nd</sup> session of the Conference of the Parties (COP22) to the UN Framework Convention on Climate Change has taken place in Marrakech, Morocco. The Paris Agreement now enjoys the support of 109 countries. In the wake of the failure to reach agreement at Copenhagen in 2009, world leaders from 196 nations succeeded in achieving the Paris Agreement **with the pledge to keep global warming to 2 degrees Celsius or less** and deliver through nationally determined contributions to

reduce greenhouse gas emissions. But the Trump cloud now hangs over the agreement. Ban Ki-Moon speaking at COP22 said:

*Cities, citizens and CEOs were crucial to mobilizing political support for the Paris Agreement. They are also among the most visionary and ambitious actors building low-carbon, resilient economies that will prosper in a climate-changed world.*

*Businesses can do more to seize the many potential opportunities. There has been tremendous progress. In the growth of renewables. In green innovations. In thriving public-private partnerships working to transform key sectors of our economy from land use and agriculture to sustainable transport.*

Answering questions at his media conference on November 15, 2016, the Secretary General was upbeat claiming, “The global business community is now fully on board and moving forward to decarbonize and lessen their carbon footprint.” In the wake of the Trump victory in the USA, this might be a little too optimistic. But at least there is now a universal appreciation that the Copenhagen approach was bound to fail and that the Paris approach inviting nation states to volunteer achievable, internationally verifiable targets and encouraging business and civil society to play their role in the greening of the economy is bearing fruit. **Pope Francis delivered a message at Marrakech welcoming the coming into effect of the Paris Agreement. He told COP22, “Its adoption represents the important awareness that, faced with issues as complex as climate change, individual and/or national action is not enough; instead it is necessary to implement a responsible collective response truly intended to work together in building our common home.”**

**Pope Francis said:**

*One of the main contributions of this Agreement is that of stimulating the promotion of strategies for national and international development based on an environmental quality that we could define as fraternal; indeed, it encourages solidarity in relation to the most vulnerable and builds on the strong links between the battle against climate change and that of poverty. Although there are*

*many elements of a technical nature involved in this field, we are also aware that it cannot all be limited solely to the economic and technological dimension: technical solutions are necessary but they are not enough; it is essential and proper to take into careful consideration also the ethical and social aspects of the new paradigm of development and progress.*

Coming from an advanced economy, I happily acknowledge that India's emissions per capita are comparatively low, being one quarter of China and one tenth of the United States. Prime Minister Modi has been committed to harnessing solar power such that every Indian household will be able to run at least one electric light bulb by 2019. Sir Nicholas Stern continues to espouse co-operative international action based on the idea of 'equitable access to sustainable development'. He suggests:

*Rich countries undertake a dynamic and attractive transition to the low-carbon economy in their own economies, taking the lead in terms of emissions quantity reductions, innovation, and providing strong examples, and of support for similar transitions in developing countries through collaboration in the areas of finance, technology and capacity building.*

Stern, like many international opinion leaders in this field, has learnt lessons in between Copenhagen 2009 and Paris 2015. He now sees that 'looking for formal international sanctions within an agreement that have **real bite** may be a mistake.' He sees a greater need for 'routes and processes that can encourage both collaboration and ambition'. There is no substitute for building trust, enhancing the 'mutually supportive relationships between overall agreements at the international level and actions at the national, regional, city or firm level'. Kevin Rudd, the Australian Prime Minister who saw so many of his dreams go up in smoke at Copenhagen 2009 made the point prior to Marrakech 2016: "The policy settings are generally now fine. The current level of financial investment in transformational infrastructure, technology, and renewable energy is not adequate. And ultimately, the planet does not lie." Neither India nor Australia can do it alone when confronting a global issue such as climate change. And given the scale of investment, innovation, and technological

development required for sustainable development governments cannot do it without business being aboard, convinced and committed to real change.

India cannot disregard the effects on other nations when it adopts laws and policies for alleviating the poverty of the poorest of the poor. Australia cannot disregard the effects on other nations when it adopts laws and policies aimed at securing and even hermetically sealing its borders, or when it considers restricting the availability of resources for export such as coal which might help provide electricity for India's poorest citizens. **The development of national laws and policies needs to be contoured by sufficient regard for the principles and values enunciated in international law. Laws and policies cannot be fully integrated into the life of the community unless the lawmakers and the policy makers are finely attuned to all that is noblest in their cultures and in their religious and philosophical traditions.** The implementation of good laws and policies depends on the character of those who exercise political power as a public trust and on those who exercise economic muscle with a commitment to the common good and the public interest, not just of the nation state but also of the community of nations and the planet itself. Corporations will not be able to play their role unless there is greater attention paid to 'corporate culture'.

Nowadays high level managers and board members are expected to take greater responsibility for their company's 'corporate culture' which includes attitudes, policies, rules, courses of conduct or practices existing within the body corporate generally or in the part of the body corporate which authorise or permit tacitly or impliedly wrongful behaviour by company employees. Boards should now be very clear in articulating a corporation's core purpose, values and principles. They should readily review how their real corporate culture aligns with the ideal stipulated in key corporate documents.

In recent weeks, there has been a very graphic instance of the breakdown of corporate culture in the mining giant Rio Tinto. On November 16, 2016, the RT board terminated the contracts of its Energy and Minerals chief executive and of its Legal and Regulatory Affairs Group executive. Having reviewed the findings of an internal investigation into 2011 contractual arrangements with a consultant who provided advisory services on the Simandou project in Guinea, the board concluded that the

executives failed to maintain the standards expected of them under the company's global code of conduct. These executives had been closely involved in providing a \$10.5 million payment to a consultant who had good access to the President of Guinea. Two days before the board terminated the contracts of two of its key executives, the CEO wrote to staff saying, 'I am fully aware that this week's announcement about Simandou came as a surprise and many people across RT are still shell-shocked. Some of us may be feeling that we are better informed by the press than by ourselves. Speculation is running in some quarters and some of what is being said strikes at the heart of the culture and values of our company which for me, are fundamentally strong and vitally important.' After his dismissal, the Energy and Minerals Chief Executive published his own statement claiming, 'The treatment of me and my past and recent colleagues is totally at variance with the values and behaviours of the company to which I have devoted my professional life.' It was not as if the Minerals Chief Executive had failed to disclose to his superiors the details and purpose of the \$10.5 million payment which his superiors had approved with the then CEO signing off with the observation, 'Worth giving this a try, but also think about optics to the GoG (Government of Guinea)'. The Minerals Chief Executive had told his superiors that the payment to the consultant was a 'very necessary step' for providing a good relationship between the company and the Guinea government achievable because of the consultant's 'very unique and unreplaceable services and closeness to the President.' The matter has now been reported to the US Justice Department, the UK Fraud Office and the Australian Federal Police. It is a matter of international concern, warranting investigation by the anti-corruption authorities in multiple countries other than Guinea. For example, the 1998 amendments to the US *Foreign Corrupt Practices Act 1977* has expanded the reach of US law enforcement well beyond the actions of US firms. I think we'll be hearing a lot more about corporate culture or ethos, and the need for broad international agreement about attitudes, policies, rules, courses of conduct or practices which impact on big business wherever it is transacted.

**Gone are the days when this sort of corporate breakdown would be investigated only within the board room or within the cabinet room of the offended African government. And gone are the days when the invocation of 'national sovereignty' or 'the free market' will foreclose**

**on options for international co-operation and international rule making providing the safety net for the planet and the poor and the scaffolding for universal respect for human rights and for best business practice. International law does not provide the answers for sustainable development in India. But there are piecemeal international developments which should assist Indian citizens and Indian decision makers at the cabinet table and in board rooms to make better decisions informed by all that is best in your religious traditions, in your national cultures, in the corporate cultures, being true to the people's noblest sense of themselves and faithful to the character each of us is called to be and develop. Never forget Mahatma Gandhi's injunction, 'One must care about the world one will not see.'** All things considered, I think JRD Tata would be happy. I hope so, for the sake of the planet, for the sake of the poor, and for the sake of our own interior peace. During his most recent appearance at the UN, Prime Minister Modi quoted from one of your ancient texts. Respectfully I repeat those words: 'May all be happy, may all be healthy, may all see welfare, may no one have any sorrow'. May the planet be happy and healthy so that future generations might be spared much sorrow.

*Thank you.*



## Fr (Dr.) Frank Brennan, SJ

Frank Brennan is a Jesuit priest, professor of law at Australian Catholic University and Adjunct Professor at the Australian Centre for Christianity and Culture, Australian National University College of Law and the National Centre for Indigenous Studies. He is the National Director of Human Rights and Social Justice for Jesuit Social Services, and superior of the Jesuit community at Xavier House in Canberra.

His most recent books include: *No Small Change: The Road to Recognition for Indigenous Australia*; *Amplifying That Still, Small Voice*; *The Quest for Leadership in Church and State*; and *The 2015 Gasson Lectures: Maintaining a Convinced and Pondered Trust*. An Officer of the Order of Australia (AO) for services to Aboriginal Australians, particularly as an advocate in the areas of law, social justice and reconciliation, he was the recipient of the Migration Institute of Australia's 2013 Distinguished Service to Immigration Award and of the 2015 Eureka Democracy Award in recognition of his endeavours which have contributed to strengthening democratic traditions in Australia.

In 2009, he chaired the Australian National Human Rights Consultation Committee. Frank serves on the board of the National Apology Foundation and the Advisory Council of the Global Foundation. His research interests include conscience and faith, human rights and the rule of law, and the rights of indigenous peoples and asylum seekers.



# **XLRI-JRD Tata Foundation for Business Ethics**

XLRI - Xavier School of Management, in association with a few select Tata Group companies, established in 1991 the XLRI-JRD Tata Foundation for Business Ethics, to mark their long-standing commitment and contribution to business ethics in India. The foundation seeks to address itself by publicly affirming the urgent need for ethics in business and the need to develop a conducive culture in which it can thrive.

The activities that are envisaged by this Foundation are an annual JRD Tata Oration in Business Ethics, recognition and presentation of the JRD Tata Award for Business Ethics to an eminent person who has distinguished oneself in business ethics, and the setting up of the XLRI-JRD Tata Chair in Business Ethics at XLRI for the advancement of research in this field.